Supreme Court of the United States

OCTOBER TERM, 1922.

No. [redacted]39

DIRECTOR GENERAL OF RAILROADS,
Petitioner,

against

SAMUEL KASTENBAUM.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER.

Statement of Case.

This case comes here on a writ of certiorari issued by this court on the 27th day of May, 1922, (Transcript, page 93, Fols. 188-189) to review the judgment of the Supreme Court of the State of New York, entered in the Clerk's office of Erie County, N. Y., on the 12th day of July, 1921. (Transcript, pages 88-89.)

The action was tried in the New York State Supreme Court, Erie County, on the 11th day of

October, 1920, and resulted in a verdict in favor of the respondent, Samuel Kastenbaum, (plaintiff below) in the sum of Five Hundred Dollars ($500). (Transcript, page 85.) From the judgment entered thereon and the order denying a new trial, the defendant appealed to the Appel late Division of the Supreme Court, Fourth Judicial Department where the judgment of the lower court was affirmed. (Transcript, pages 86-87; Fols. 171-173.) Judgment of affirmance was thereupon entered in the Erie County Clerk's office on the 12th day of July, 1921, (Transcript, p. 88) but an order was thereafter granted by the Appellate Division for the reargument of the appeal. (Transcript, pages 88-9.) Thereafter and on the 15th day of November, 1921, after said reargument had been had in the said Appellate Division, the judgment and order was affirmed. (Transcript, page 90.) In accordance with the practice of the State of New York, an application was thereafter made for leave to appeal to the Court of Appeals, which application was denied by the said Appellate Division. (Transcript, page 91.) An application was then made on behalf of the petitioner herein to the Court of Appeals directly for leave to appeal to the Court of Appeals, but said application was denied by said Court of Appeals. (Transcript, pages 92-93.) An application was then made to this court for a writ of certiorari on the 29th day of April, 1922, and the writ was granted as hereinabove pointed

out by this court on the 26th day of May, 1922, (Transcript, page 93) and the return to said writ was filed on June 26, 1922.

Question Involved.

The single question involved upon this appeal may be stated as follows:

Does an action for false arrest lie against petitioner, an officer of the United States Government, and is such a cause of action included within the provisions of section 10 of the Act providing for Federal Control of Carriers? (40 U. S. Stat. 451. Chap. 25, Act of March 21, 1918).

Statement of Facts.

The respondent, Samuel Kastenbaum, on or about the 12th day of August, 1918, commenced this action, by the service of a summons and complaint, against the Lehigh Valley Railroad Company. (Transcript, pages 3-7). The said defendant interposed an answer in the form of a general denial asserting *inter alia* that the said Lehigh Valley Railroad was at the time in the control of the Director General of Railroads. (Transcript, pages 7-9). Thereafter, the plaintiff filed an amended complaint in which the defendant named was the Director General of Railroads. (Transcript, pages 9-13). The defendant, Director General of Railroads, thereupon served an an-

swer to the said amended complaint, which is in the form of a general denial with the exception of certain admitted facts. (Transcript, pages 4-15).

The plaintiff alleged in his amended complaint that during the period of Federal Control of the railroads, he was arrested by an agent of the defendant and that the arrest was false, wanton and malicious and without probable cause. (Transcript, pages 10-11; Fols. 20-23). He further alleged that upon a hearing in the City Court of Buffalo he was discharged. (Transcript, page 12; Fols. 24-25). His discharge was admitted upon the trial.

The complaint stated causes of action both for malicious prosecution and for false arrest. The cause of action for malicious prosecution was dismissed by the Trial Court at the close of the plaintiff's case. (Transcript, page 36; Fols. 72-73). The defendant's motion to dismiss the cause of action for false arrest was denied by the Trial Court (Transcript, page 30; Fols. 72-73) and a motion to dismiss the plaintiff's complaint at the close of the entire case was also denied. (Transcript, pages 80-81; Fols. 156-158). While it is true that the complaint charged the filing of an information upon which the plaintiff, Kastenbaum, was arrested and taken into custody, (Transcript, pages 3-4; Fols. 6-9), the undis-

puted evidence was that no warrant had been issued at the time the respondent was taken into custody. (Transcript, page 22; Fols. 45-46; pages 74-75; Fols. 145-146).

It is not claimed by the Petitioner that a warrant had been issued at the time the arrest was made. The action was treated by the Trial Court and by counsel for both parties as an action for false arrest.

The charge of grand larceny, third degree, was laid against the respondent on the ground that he had stolen and taken away a quantity of butter valued at $1,000, contained in a freight car of the Lehigh Valley Railroad, and it was the claim that the property had been appropriated to the use of the respondent. (Transcript, pages 10-11; Fols. 21-22).

The Director General of Railroads contended in the lower courts *inter alia* that his agent was justified in making the arrest in that the agent had probable cause to believe that the respondent had committed the crime. This court is, of course, precluded from examining any question of fact which was before the lower courts, upon this point. The only question before this court upon the issuance of this writ is whether an action of this character in maintainable against the Director General of Railroads. The petitioner contends that no such cause of action lies.

POINT I.

The Courts of the State of New York erroneously held that an action for false arrest would lie against the Director General of Railroads, an officer of the United States; such a cause of action is not included within the provisions of Section 10 of the Act providing for the Federal control of carriers.

(a). It is well settled that a cause of action for a tort may not be enforced against the sovereign government unless express consent to a suit to bring such a cause of action has been given by the sovereign government.

This rule is too well settled to require extended argument or citation of authority. In the leading case of *Bigby vs. U. S.* (188. U. S. 400) this court said, at page 406:

> "In *Robertson v. Sichel*, 127 U. S. 507, 515, the court said: 'The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.' So in German Bank of Memphis v. United States, 148 U. S.

573, 579: 'It is a well-settled rule of law that the Government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress.' "

* * * * * *

"It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the Government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887."

See also *Belknap vs. Schild*, 161 U. S. 10; *Langford vs. U. S.*, 101 U. S. 341; *Keokuk vs. Hamilton Bridge Company of U. S.*, U. S. Adv. Sheets, December 1, 1922, page 35, *in re Nabors*, 280 Fed. Rep. 943.

Specifically applying this rule to suits involving the Director General of Railroads, Judge Westenhaver, in the case of *Sandoval vs. Davis*, 278 Fed. Rep. 968, said, at page 971:

"(2) It is now also settled law that during federal control the operation of railways by the Director General was in substance and effect operation by the United States; that an action against the Director General to recover for injuries due to negligent operation is an action against the United States; and that

> a liability arises and an action can be maintained only if created and consent by the United States to be sued is given by some specific provision of law."

(b). The Federal Control Act did not express the consent of the government to a suit for false arrest.

Section 10 of the Federal Control Act reads as follows:

> "That carriers while under Federal control shall be subject to all loss and liabilities *as common carriers*, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President."

It is the contention of the petitioner that the words "liabilities *as common carriers*" were not intended to cover actions of such a nature as actions for false arrest. We believe that it is apparent that it was intended that such words were designed to cover only actions for negligence, breach of contract or the like; but that it never was intended to include an action for a tort, which implies necessarily an element of moral wrong and turpitude upon the part of the government's representative.

The complaint in this case alleged two causes of action: One for malicious prosecution and one for false arrest. It is true that at the close of the plaintiff's case the cause of action for malicious prosecution was dismissed. (Transcript, page 36, Fols. 72-74). The trial court, however, submitted the cause of action for false arrest to the jury, (Transcript, pages 80-81, Fols. 156-158) notwithstanding the motion made by counsel for defendant at the close of the plaintiff's case and at the close of the whole case for a dismissal.

It is important that this court should understand thoroughly the elements and nature of an action for false arrest under the law as interpreted by the decisions of the courts of the State of New York.

The leading case upon the subject is that of *Schultz vs. Greenwood Cemetery*, 190 N. Y. 276, where the Court of Appeals said, in its opinion, at page 278:

> "An action against an officer for a false and illegal arrest and detention, known as an action for false imprisonment, may be justified by proof that a crime was committed and that he had reasonable ground to suspect that the person arrested was the offender; the arrest being made in good faith and without evil design. *The action is in the nature of a trespass for a direct wrong or illegal act, in which the officer and defendant must have*

personally participated by direct act or indirect procurement. The gist of the action is an unlawful detention, the burden of proof to establish probable cause for the arrest, or reasonable ground for suspicion, is upon the defendant. (Burns v. Erben, 40 N. Y. 463).

"An action for malicious prosecution against an officer or other person may be defended by proof of reasonable and probable cause for the prosecution and the burden of proving want of probable cause is upon the plaintiff. The plaintiff must allege and prove, not only the want of probable cause for the prosecution, but also that it was inspired by malice. (Besson v. Southard, 10 N. Y. 236; Heyne v. Blair, 62 N. Y. 19; Thaule v. Krekeler, 81 N. Y. 428; Anderson v. How, 116 N. Y. 336; Willard v. Holmes, Booth & Haydens, 142 N. Y. 492). In either case the action is defended whenever the facts and circumstances stated have been established, though it may turn out that the person arrested or prosecuted was innocent. It is not necessary for the defendant in this class of actions to establish that the person arrested was actually guilty. As this court has stated, innocent parties may sometimes be subjected to inconvenience and mortification; but any more lax rule would be greatly dangerous to the peace of the community and make the escape of criminals frequent and easy. (Burns v. Erben, *supra*, p. 470.") (Italics are ours).

It will be noted that an adequate defense to the claim is that the defendant had probable cause for the arrest or reasonable ground for suspicion of the guilt of the plaintiff. While the burden

of proving such probable cause or reasonable ground for suspicion is upon the defendant, nevertheless, if these elements are proved by the defendant, an adequate defense is established.

We respectfully submit that in an action against the sovereign government it must be conclusively presumed that good faith existed upon its part; that this necessarily requires probable cause for an arrest or reasonable ground for suspicion; that it will not be presumed that the defendant recklessly, and without probable cause, procured the arrest of innocent persons, but that the contrary must necessarily be presumed. We submit that the good faith of the sovereign is an irrebuttable presumption and neither malice nor lack of good faith may be presumed against it.

In the case of *Pearl Dougherty v. Payne as Director General of Railroads*, decided by the United States District Court in the Southern District of Florida, 276 Fed. 451, the opinion of Judge Call reads as follows:

> "This cause comes on for hearing upon the motion for leave to file an amended declaration.
>
> "Heretofore on May 27th, inst., a demurrer was sustained to the declaration.
>
> "The 5th ground of the demurrer raised the question whether an action for malicious prosecution could be brought against the Director General of Railroads, as such officer,

> for the actions of one of the employees of a railroad system under his control. A careful study of the Acts of Congress covering the Governmental control of transportation system seems to me to answer this question in the negative. Such being my view no purpose would be served in granting the motion to amend and it will therefore be denied."

This decision was handed down June 9, 1921, and, as we are informed, the action was brought for the malicious prosecution of a linen counter employed by the Pullman Car Lines at Jacksonville, Fla., her arrest was procured at the instance of employees of the Pullman lines. She was acquitted by a jury and brought suit for malicious prosecution.

In the case of *Hines vs. Bowling*, 272 Fed. Rep. 230, suit was instituted to recover for damages for malicious prosecution. The question involved in this case was referred to by Judge Boyd in his opinion, but was not passed upon. Judge Boyd stated:

> "The question which arises is whether or not, under such circumstances, malice or wrongful motive can be imputed to the Chief Executive, who was performing an official function, or to the Director General, his *alter ego*, and made the ground of damages at the instance of an individual in a suit against the latter. However, this proposition was not relied upon, nor argued by defendant's counsel, and we do not deem it necessary to pass upon it in order to dispose of the case."

In *State vs. Hines, Agent*, 228 S. W. Rep. 667, the Court of Civil Appeals of Texas held that an action for penalties did not lie against the Director General of Railroads for failure to keep well lighted the water-closets and adjacent depot grounds maintained at several passenger stations of a railroad taken over by the Director General of Railroads. The statutes of the State of Texas imposed a penalty for failure to keep these places lighted.

In *Missouri Pacific R. R. Co. vs. Ault*, 256 U. S. 554, both the railroad corporation and the Director General of Railroads were sued for a penalty under a statute of the State of Arkansas for non-payment of the wages of an employee within a certain period of days after his discharge. The judgment against the corporation was dismissed upon the ground that after the assumption of Federal control of the carrier the railroad corporation could not be held responsible for any acts of the employees of the road. In considering the question of the liability of the Director-General, the Supreme Court, in its opinion at page 557, said:

> "The contention that the Director General being the carrier, is liable for the penalty imposed by the Arkansas statute, is rested specifically upon the clause in Sec. 10, to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers

whether arising under State of Federal laws or at common law' and the provisions of Sec. 15 that the 'lawful police regulations of the several states' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, *arising out of the operation of the railroad,* were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed."

(Italics are ours).

We think that it appears from the authorities cited hereinabove that it was not the intention of Congress, at the time that the Federal Control Act was enacted, to authorize actions of a nature such as false arrest against that official of the United States Government representing it. It cannot be thought that the Sovereign Government would consent to be sued in a class of cases such as actions for malicious prosecution or false arrest, where there was an element of moral wrong upon its part.

False arrest or false imprisonment, has been defined as follows in *Addison on Torts*, p. 552:

"False imprisonment has been well defined to be a trespass committed by one man

> against the person of another by *unlawfully* arresting him and detaining him without any legal authority."

In *New York P. & N. R. Co. vs. Waldron*, 82 Atl. 709, the action was defined as follows:

> " 'False imprisonment' is a wrong akin to that of assault and battery, and consists of imposing, by force or threats, unlawful restraint on a person's freedom of locomotion It is the unlawful detention of a person against his will."

It is a universal principle that unless it is apparent from statute that a liability is intended to be imposed upon the government, such liability will not be held to exist by implication nor upon general principles. In the very recent case of *Pine Hill Co. v. United States*, decided May 29, 1922, reported in U. S. Advance Sheets, page 584, Mr. Justice Holmes said:

> "A liability in any case is not to be imposed upon a government without clear words."

We respectfully submit that within the authority of the cases hereinabove set forth it will not be presumed that the Government of the United States consented, by the Federal Control Act, to be sued in actions embracing an element of wrong or illegality upon the part of the sovereign.

POINT II.

The plaintiff's complaint herein should be dismissed with costs and judgment directed for the defendant.

Respectfully submitted,

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